

PART II

**POLITICAL, LEGAL, AND MORAL
RELATIONS**

Abstract

This chapter develops an original account of what unjust subordination consists in. It then uses this account to argue that both direct and indirect discrimination are often wrongful because of their contribution to unjust subordination. The chapter begins by arguing that we need to move away from individualistic conceptions of subordination and to consider subordination as something that happens to a person by virtue of her membership in social groups. It then lays out a set of four common and morally salient features of situations in which one social group is subordinated by others, and it uses these to help analyze cases of discrimination. In particular, the chapter calls attention to the role of “structural accommodations.” These are policies, practices, and physical structures that tacitly accommodate a more privileged group’s needs at the expense of subordinated groups. Structural accommodations help us understand how indirect discrimination, too, can be wrongfully subordinating.

Keywords

indirect discrimination, direct discrimination, subordination, structural accommodation, social groups

Discrimination and Subordination

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There is something particularly compelling about the idea that discrimination is wrong when and because it unjustly subordinates some people to others. The kinds of discrimination that usually give rise to the greatest moral indignation involve the creation or perpetuation of different classes of people, with some having a superior status and others an inferior one, in circumstances where we think that everyone ought to have an equal status. Consider, for instance, the Jim Crow laws, which turned African-Americans into second-class citizens; or dress codes for waitresses or female retail employees that mark them out as sexual objects, lacking the full and independent agency that we ascribe to men. Moreover, the idea that unjust subordination can help to explain the wrongness of certain forms of discrimination does not just have a hold on our moral imaginations. It is also deeply rooted in the law. Both the United States' Fourteenth Amendment and the constitutional equality rights in Section 15 of the *Canadian Charter of Rights and Freedoms* have been understood—by courts, and also by academics—as prohibiting government policies that subordinate people based on certain traits.¹ And of course, when private sector anti-discrimination law was first

¹ For seminal discussions of unjust subordination in the context of the United States' Fourteenth Amendment jurisprudence, see [Owen Fiss, "Groups and the Equal Protection Clause," *Philosophy & Public Affairs* 5\(2\) \(1976\), pp. 107–77](#); [Ruth Colker, "Anti-Subordination Above All: Sex, Race, and Equal](#)

developed in these two countries in the 1960s and 1970s, it was treated as a form of quasi-criminal law that aimed to eliminate acts of prejudicial subordination, acts that deliberately denied certain privileges or benefits to members of certain social groups on the grounds that these groups were less worthy than others.² But what exactly does unjust subordination involve? And how do discriminatory acts and policies work to subordinate certain social groups and to sustain their subordination?³ It is the aim of this chapter to answer these questions.

Protection,” *New York University Law Review* 61 (1986), pp. 1003–44<<<REFC>>>.

<<<REF:JART>>> Mari J. Matsuda, “Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction,” *Yale Law Journal* 100(5) (1991), pp. 1329–

407<<<REFC>>>; <<<REF:JART>>> J.M. Balkin, “The Constitution of Status,” *Yale Law*

Journal 106(8) (1997), pp. 2313–74<<<REFC>>>; and <<<REF:JART>>> J.M. Balkin and Reva

B. Siegel, “The American Civil Rights Tradition: Anti-classification or Anti-subordination?” 58

University of Miami Law Review 9 (2003) p. 246<<<REFC>>>. Canadian courts adjudicating

equality rights cases tend to speak of “stereotyping” rather than of subordination, but their

discussions of stereotyping are often discussions about subordination. See, for instance,

<<<REF:BK>>> Colleen Sheppard, *Inclusive Equality* (New York: McGill-Queen’s University

Press, 2010)<<<REFC>>>.

² See <<<REF:JART>>> Denise Réaume, “Harm and Fault in Discrimination Law,” *Theoretical Inquiries in Law* 2 (2001), pp. 349–85<<<REFC>>>.

³ Here, and often in the chapter, I shall use the term “subordination” as a shorthand for “unjust subordination.” This is not because my account presupposes that all forms of subordination are unjust; it is just a convenient shorthand. I do assume that whenever one social group is assigned an

Most of the legal scholars who analyze discrimination in terms of its contribution to subordination invoke a relatively under-specified, intuitive idea of subordination. For instance, when Owen Fiss first urged that the US Equal Protection Clause was best interpreted not as preventing arbitrary classifications but as eliminating unfair subordination, he suggested that subordination was a “status harm” that involved perpetuating the lower social position of persistently disadvantaged social groups.⁴ But it was not his aim to develop a general account of what that status harm involved. More recently, Reva Siegel and Joel Balkin have examined the ways in which courts, in cases of discrimination, are motivated by concerns with “social stratification” and “the secondary social status of historically oppressed groups.”⁵ But they do not explain in detail what “social stratification” involves. Their interest is largely in charting how concerns about social stratification motivate judges to adopt particular legal doctrines and to decide certain cases in certain ways. My aim in this chapter is different. It is to develop a philosophical account of subordination, one that can help us understand some of the ways in which different forms of discrimination subordinate people, and the reasons why they might be wrong, in virtue of contributing to such subordination. I will not try to specify a set of individually necessary

inferior status across a number of different social contexts for some lengthy period of time, this is unjust; but this assumption is quite consistent with the view that it may sometimes be just to assign a certain social group (e.g. employees) a status lower than that of another (e.g. their managers) for some specific purpose in a certain limited context (e.g. for work-related purposes, while at their place of work).

⁴ Fiss, *supra* note 1 at 157.

⁵ Balkin and Siegel, *supra* note 1 at 256.

and jointly sufficient conditions for social subordination. But I shall lay out in some detail four conditions that seem to be satisfied in most cases where the subordination of a certain group persists across different social contexts for some extended period of time and seems unjust. I shall do this in [Section 3](#) of the chapter. [Section 4](#) will consider how discrimination contributes to subordination, so understood.

C5.P3

The scholars of discrimination law who come closest to offering a philosophical analysis of subordination and of how discrimination subordinates are expressivists Deborah Hellman, Elizabeth Anderson, and Richard Pildes.⁶ They have argued that an act is wrongfully discriminatory when it subordinates a person to others in the sense that the act demeans her, or sends the message that she is of less value than others. I shall consider Hellman's account in [Section 2](#) of the chapter. While this account is extremely helpful in drawing our attention to the ways in which discriminatory acts send messages about the inferior status of certain groups, I shall suggest that, at least in its current form, the account is too individualistic. It focuses too much on the individual power dynamic between the discriminator and the discriminatee, when in fact we need to look at the relative amounts of power possessed by the different social groups to which these people belong. I shall also argue that expressivism offers us too narrow an understanding of subordination. Subordination is not only a function of the social messages sent by particular acts or policies. Rather, it is kept in place by a variety of effects that discriminatory acts have on different

⁶ [REF:JART](#) Elizabeth Anderson and Richard Pildes, "Expressive Theories of Law: A General Restatement," *University of Pennsylvania Law Review* 148(5) (2000), pp. 1503–76 [REFC](#), especially pp. 1533–44; [REF:BK](#) Deborah Hellman, *When Is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008) [REFC](#).

social groups, such as perpetuating differences in power and authority between them and rendering certain social groups or their needs invisible in certain contexts.

C5.P4

In addition to focusing on social groups, my own account of subordination places special emphasis on one feature of subordination that is not often foregrounded. This is the fact that subordination often depends, for its persistence, on what I shall call “structural accommodations.” These are policies, practices, and physical structures that tacitly accommodate a more privileged group’s needs at the expense of the subordinate group or groups. Normally, within anti-discrimination law, we use the term “accommodation” to refer to a special measure that must be adopted in order to give the subordinated group an opportunity equal to that of the more privileged group. And we assume that the subordinate group requires an accommodation because that group has certain special needs. So, for instance, when a Muslim employee requests an altered work schedule so that he can pray at the times that his religion requires, we treat the altered schedule as an “accommodation” to which he is entitled, because of the special demands of his religion. As we have learned from feminists, critical race theorists, and disability theorists, however, at least part of the reason why these groups require an accommodation in the first place is that our social environment has been constructed in such a way as to tacitly accommodate the needs of more privileged groups.⁷ I shall be proposing that we need to think of *these* prior policies, practices, and structures as “accommodations”—accommodations to the more privileged social groups, which make their interests and needs seem normal and the interests of other groups seem exceptional. And I shall argue that we cannot understand the subordination of one group by another, or the real contribution of discrimination to subordination, unless we consider these

⁷ See the works cited in note 15, *infra*.

“structural accommodations.” For they serve indirectly to rationalize the greater power and *de facto* authority that are held by these groups and the greater deference we pay to them.

We can, I shall argue, see many of the policies that constitute wrongful indirect discrimination as “structural accommodations” that contribute to unjust subordination. So my account of subordination will give us a way of explaining in detail not just how direct discrimination subordinates, but how indirect discrimination, too, subordinates.

C5.P5 Before I turn to this account of subordination, however, I need to explain what I take discrimination to involve. I shall do so in [Section 1](#), by discussing some common examples of discrimination in the restaurant industry. I shall return to these examples at later stages in the chapter, both to evaluate the expressivist account of how discrimination subordinates and to develop my own account.

C5.S1 1. DIRECT AND INDIRECT DISCRIMINATION:

UNIFORMS FOR RESTAURANT EMPLOYEES

C5.P6 Most countries that prohibit discrimination recognize two forms of potentially wrongful discrimination: “direct discrimination” and “indirect discrimination” (or, in the United States, “disparate treatment” and “disparate impact”). In this section of the chapter, I want to lay out a rough definition of these two forms of discrimination along with an example of both, so that we can have an idea of what it is that we think subordinates people, when we speak of “discrimination” subordinating. I shall work with standard legal ideas of discrimination, rather than first trying to develop my own more rigorous definitions from some independent moral standpoint, for two reasons. The first is that part of my aim in this chapter is a legal one. It is to see how far we can make sense of the particular phenomenon

that the law carves out as “discrimination,” as wrongful because it subordinates. But the second reason why I am taking our legal concepts of discrimination as my starting point is that it seems to me that even a purely moral analysis of discrimination needs to attend at least to the broad contours of the definitions of discrimination that have been carved out by the law. This is because our shared moral understanding of discrimination has been deeply shaped by our legal regimes for regulating it—to such an extent that if someone departed too radically from the core understanding of discrimination given to us by our laws, it might seem that they were talking about a different moral phenomenon entirely.⁸

⁸ In this respect, discrimination is arguably different from many other moral wrongs. We could certainly explain what murder is and why it is morally wrong without looking at the structure of criminal prohibitions on murder, just like we can explain why promises must be kept without consulting contract law. But I am not sure how an account of discrimination and its wrongness could expect to be accurate if it did not accord with at least some of the shared features of many anti-discrimination laws across different jurisdictions—such as the fact that most jurisdictions recognize some kind of distinction between direct and indirect discrimination, and the fact that most treat discrimination as unfair only if it occurs on the basis of a limited list of “prohibited grounds” of discrimination. For further discussion of the relevance of the law to analyses of discrimination, see my article “Equality and Discrimination,” forthcoming in *The Cambridge Companion to Philosophy of Law*, ed. John Tasioulas (Cambridge University Press). For defense of the claim that there *is* enough common ground between the different anti-discrimination laws of different countries to talk about there being a “core understanding” of discrimination, see

[<<<REF:BK>>>](#) Tarun Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015) [<<<REFC>>>](#).

C5.P7

What, then, does the law take to be potentially wrongful discrimination? Consider, for a start, the practice of some restaurants and bars of imposing a gendered dress code on their employees.⁹ Rather than providing a gender-neutral set of options and allowing each employee to choose what suits them, these restaurants require female employees to wear tighter fitting clothing designed to show the shape of their bodies, low-cut tops, shorter skirts, and high heels. Men, by contrast, are usually permitted to wear more comfortable, looser-fitting clothing that is not revealing. If you have thought about such dress codes, you have probably already reflected on the messages they send about the appropriate social roles of men and women; the ways in which they mark women out as inferior; and the additional physical and health burdens they place on women, both through the tight clothes that restrict their movement and through the high heels that cause foot and back pain. They are standard examples of what, in most legal jurisdictions, we call “direct discrimination”:

C5.P8

Direct Discrimination: A policy directly discriminates against a person, P, if the policy treats P less favorably on the basis of some trait, *t*, than it would treat those who lack *t*, either by explicitly singling out people with *t* or by singling out those who have a different trait, *u*, that is in some way very closely connected to *t* (for

⁹ For an overview of common practices surrounding restaurant dress codes and their impact on a variety of underprivileged groups, see *Not on the Menu: Ontario Human Rights Commission Inquiry Report on Sexualized and Gender-based Dress Codes in Restaurants* (March 2017), available at <http://www.ohrc.on.ca/en/not-menu-ohrc-inquiry-report-sexualized-and-gender-based-dress-codes-restaurants>.

instance, only those who have t can have u , or most of those who have t do have u ...), where t is a prohibited ground of discrimination.

C5.P9

The dress codes for employees adopted by many restaurants also indirectly disadvantage transgendered people, pregnant women, and members of certain religions, though none of these groups is explicitly singled out by the policies. Trans employees may have to pigeon-hole themselves into the uniform for one gender or the other, even if this does not express their current gender identity. Pregnant women are often disproportionately burdened because at some point their pregnancy makes it impossible for them to fit into a tight-fitting uniform, and they then face the difficulty of having to tell their employer sooner than they would have liked. Similarly, members of religious groups that require particular modes of attire may find it difficult or even impossible to adopt the dress codes while practicing their religion, and so might be unable to work in this industry. So, in addition to constituting direct discrimination against women as a group, the dress codes constitute what in the law we call “indirect discrimination”:

C5.P10

Indirect Discrimination: A policy indirectly discriminates against a person, P, on the basis of trait t , if the policy, though it does not explicitly single P out because of t or some related trait, u , nevertheless disproportionately disadvantages those who have t relative to those who do not, where t is a prohibited ground of discrimination.

C5.P11

Note that, as defined here, the main difference between direct and indirect discrimination is that direct discrimination explicitly singles out a certain group or person based on a certain

trait or some trait that is closely connected to it, whereas policies that discriminate indirectly do not. The latter are apparently neutral, seemingly applying the same criterion to everyone; but they nevertheless have a disproportionately disadvantageous effect on a group that shares a trait that is a prohibited ground of discrimination.¹⁰

C5.P12

There are two related practices worth examining, in connection with restaurant dress codes; for these practices constitute an even more subtle form of indirect discrimination than those I have already examined. First, many restaurants do not stock any uniforms of a kind that might be easily put on and worn by people with muscular disabilities (disabilities that make it difficult for them to put on or wear tight clothing, for instance, or to do up all of the buttons on button-up shirts). And this means that such people, when hired, are placed in the difficult position of being unable to put on their uniform without assistance, or of having to step forward and ask for a different uniform and so present themselves as “abnormal.” Second, even restaurants that have officially adopted gender-neutral, disability-friendly dress codes often hand new employees a training manual that has pictures only of young, svelte, conventionally attractive women dressed in the most feminine uniform options. Insofar as such manuals reinforce the image of people as useful and employable only insofar as their

¹⁰ Neither this definition of indirect discrimination nor my earlier definition of direct discrimination presuppose that it is *always* wrong to engage in direct or indirect discrimination. And this is both consistent with most jurisdictions’ approaches to discrimination and intuitively plausible: most recognize that certain kinds of considerations can justify discrimination, rendering it not wrongful. I shall, later in the chapter, use my account of subordination to argue that *when they contribute to subordination*, then direct and indirect discrimination are wrong. But I am not presupposing that they always contribute to subordination, or that they are always wrong.

physical appearance is “normal,” and insofar as they suggest that it is part of a woman’s role as a waitress to use her body to gratify men, they disproportionately burden women, pregnant women, people with disabilities, and trans people.

C5.P13 Let us now consider what expressivist theories of discrimination would say about such practices, looking in particular at Deborah Hellman’s theory of discrimination as wrongful because it demeans.

C5.S2 2. HELLMAN’S EXPRESSIVIST VIEW: SUBORDINATING BY DEMEANING

C5.P14 Hellman has argued that discrimination is wrong when and because it puts someone down, treating them as though they are “not fully human” or “not as worthy as others.”¹¹ She uses the term “demean” to refer to the kind of subordination that she has in mind. One might think that to demean someone is simply to act in a way that sends the social message that another person is less worthy of respect. And this is certainly how traditional expressivists have understood it. But Hellman uses the term “demean” in a specialized way, to refer to a sub-group of those acts that send the message that someone is less worthy of respect than others. For she notes, quite rightly, that not all acts that send such messages actually do affect the social status of others. For instance, she suggests, when an employee spits at her boss or a child taunts her classmate, their acts send an inferiorizing social message but do not

¹¹ <IBT>Hellman, supra note 6</IBT>, p. 35.

actually lower the status of the person insulted.¹² In Hellman's view, in order to constitute objectionable subordination, a discriminatory act must both (i) send an inferiorizing message and (ii) by virtue of sending that message, actually put the person down or lower his status. Whether it actually puts him down depends in large part, she suggests, on whether the discriminator has power over, or a higher status than, the discriminatee.¹³ So the employee cannot put her boss down because she lacks the power to do so; and the same is true of the child relative to her classmate.

C5.P15 It seems right that many acts of discrimination that subordinate do so in part because of the social messages they send—messages about the inferiority of some groups or the superiority of others. And it also seems right that, in order to subordinate someone, one must affect their status in the world rather than simply expressing something about them; though, as I shall later argue when I develop my own account of subordination, it isn't clear that subordinating a person always involves lowering their status, as opposed to simply confirming or perpetuating an already inferior status.

C5.P16 But there are at least two respects in which the expressivist account seems problematic. First, whether one person's expression of disrespect for another can actually put that other person down seems to depend not just on the power differential between the two individuals, but more broadly, on the power and authority that the *social groups* to which they belong have, relative to each other. Consider again Hellman's examples of spitting at one's boss or insulting a classmate. Surely these acts could sometimes put the person down. If I am a white employee and you are my African-American boss and I spit at you in full view of all

¹² Ibid., 35–6.

¹³ Ibid., 36.

of my other fellow white employees, I can indeed lower your social status. (I can't, of course, affect your employment status—that is, your status as my boss. But that isn't the kind of status that is at issue here, when we are considering whether someone is put down by an act. What's at issue is social status. And I can certainly lower your social status by spitting at you, even if I am just your employee.) I can do that precisely because, in our version of the example, I am white and you are black, and whites and blacks in our society have a certain history, relative to each other, which my act invokes. Similarly, if the child insulted by a classmate in Hellman's example is indigenous and he is called a "drunk Indian" by a white child, the act can lower his status in the classroom, or perpetuate his already low status. That is because the group to which the white child belongs has historically possessed, and continues to possess, a great deal of power and authority over the ways in which indigenous children are portrayed in our society. So, in order to assess whether someone's act puts down another, we need to look not just to the positions of these two people relative to each other, but to the social groups to which each belongs and the relationship of these groups to each other.

C5.P17 Hellman could, I believe, adopt this more group-based perspective consistently with her expressivist tenets. So this first difficulty points simply to a way in which the theory requires modification. The second difficulty that I shall discuss, however, is a difficulty with the expressivist core of this view. As I shall now argue, it is unclear that it is only the social message sent by a particular act or policy that determines whether it unjustly subordinates. To see this, let's turn back to my example of uniforms for restaurant employees.

C5.P18 Consider first the gendered dress code that requires female employees to dress in sexualized and revealing ways. It is true that this dress code sends a message about women needing to appear in a sexualized way so as to please male clients, and that, given the overall

context, the message really does have the effect of confirming their already inferior status. But the dress code also seems to do many other things to women, and it does not do these things only because it sends a message about women's inferior status. Requiring women to dress in tight clothing and heels hampers their ability to move, thereby giving them less power in the workplace than their male colleagues and male clients; so it lessens their power, quite independently of the social message it sends about them. It gives women less authority over their own self-presentation than men have, again, not because it sends a message about women's inferiority but because it denies them a choice that it gives to their male colleagues. It presents a certain conception of how women ought to dress as preferable than others, thereby elevating the women who dress this way above those women who do not, creating a hierarchy within the class of women (a hierarchy that in turn helps to perpetuate women's subservience to many men's attitudes about them). And it renders invisible those women who have figures that do not conform to this image. Although we do not yet, at this stage in the chapter, have a detailed conception of subordination to help confirm the relevance of these facts to women's subordination, it seems implausible to suppose that these facts are irrelevant. But the expressivist account gives us no way of recognizing the relevance of such facts, except insofar as they can be reinterpreted as aspects of, or effects of, the social message of inferiority sent by the discriminatory policy.

C5.P19 Moreover, my examples of indirect discrimination—for instance, the disproportionate burden that gendered dress codes placed on trans people, pregnant women, and members of certain religious groups—seem also to present us with cases of discrimination that subordinate people, and that do so in a similar, though not identical, way to direct discrimination. But it is unclear that the dress codes send a message about the inferiority or lack of worth of these groups: they seem rather simply to overlook their situations. So it is

unclear that an expressivist could recognize this as discrimination of a sort that wrongfully subordinates. Hellman would likely reply that in her view, direct and indirect discrimination are two different kinds of wrongs. Direct discrimination demeans, and so wrongfully subordinates; whereas indirect discrimination does not usually demean but is wrong for some other reason—for instance, as Hellman has recently suggested, because it compounds past injustices.¹⁴ Perhaps Hellman might even argue that “compounding a past injustice is a kind of subordination”; it is just a *different* kind of subordination. However, if both of these forms of discrimination seem to confirm or perpetuate the lower status of certain social groups, then, rather than drawing a bright line between those that demean and those that do not, perhaps we should see whether there is a single account of subordination that can allow us to explain, in rich and detailed ways, how different forms of discrimination work to create or confirm a person’s lower status. And, as I argued earlier, we should try to do so in a way that clearly acknowledges the role of the social groups to which that person and the discriminator belong. In the next section of the chapter I shall try to develop such an account.¹⁵

¹⁴ <<<REF:BKCH>>> Hellman, “Indirect Discrimination and the Duty to Avoid Compounding Injustice,” Chapter 5 of *Foundations of Indirect Discrimination Law*, ed. Hugh Collins and Tarunabh Khaitan (Oxford: Hart Publishing, 2018), pp. 105–21 <<<REFC>>>.

¹⁵ I don’t purport to offer the only philosophical account of unjust subordination; though I do think it is the only one that has been systematically developed in light of concerns about how discrimination subordinates. Philosophers have discussed subordination in other contexts, and I draw on their work in what follows. For instance, feminists such as Rae Langton and Catharine MacKinnon have developed theories of subordination within discussions of pornography: see, for

3. TOWARD AN ACCOUNT OF SOCIAL SUBORDINATION

What we need is an account of subordination that considers the broader relationship between the social group (or groups) to which the discriminatees belong and the social group to which the discriminator belongs. We need an account of what I shall call *social*

example, <<<REF:BK>>>Rae Langton, *Sexual Solipsism* (Oxford: Oxford University Press, 2009) <<<REFC>>> and <<<REF:BK>>>Catharine MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993) <<<REFC>>>. Relational egalitarians such as Elizabeth Anderson and Samuel Scheffler have given analyses of the kinds of non-subordinating relationships that are required in order for us to live in a true society of equals—that is, a society in which everyone stands, to every other person, in a relationship of equality. See <<<REF:JART>>>Elizabeth Anderson, “What Is the Point of Equality?,” *Ethics* 109(2) (1999), pp. 287–337 <<<REFC>>> and “The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians,” *Canadian Journal of Philosophy: Supplementary Volume on Justice and Equality* 36 (2010), pp. 1–23; and <<<REF:BKCH>>>Samuel Scheffler, “The Practice of Equality,” in Carina Fourie, Fabian Schuppert, and Ivo Wallimann-Helmer (eds.), *Social Equality: On What It Means to Be Equals* (Oxford: Oxford University Press, 2015), pp. 21–44 <<<REFC>>>. Lastly, subordination has been recently discussed by political philosophers who argue that democracy is valuable because, and insofar as, it enables us to relate to each other as social equals, without subordination. See <<<REF:JART>>>Niko Kolodny, “Rule Over None II: Social Equality and the Justification of Democracy,” *Philosophy & Public Affairs* 42(4) (2014), pp. 287–336 <<<REFC>>>.

subordination—that is, the state of affairs in which one social group has a standing in society that is lower than that of another.

C5.P21

As a preliminary to developing such an account, I should clarify what I mean by a “social group.” As I am using the term, a “social group” is an entity that has an existence apart from any particular member: one can speak about the group without reference to those who happen to be its current members. A social group shares, or is presumed to share, a certain trait. But it is not just any group of people who happen to share a certain trait, such as “people with bushy eyebrows,” that count as a social group in the sense that I am concerned with. Rather, the kinds of social groups that are subordinated either possess, or are presumed by others to possess, a particular type of trait, a trait that is *socially salient*, in the sense that others in society take that trait to have implications for the character and behavior of members of the group, and for the social roles that they are capable of occupying. And it is often by this socially salient trait, or a combination of it and other traits associated with a sub-group of those who possess this trait, that we identify members of that social group. So, for instance, “wearers of blue, crimson, or scarlet velvet” does not, in our current society, mark out a group of people through their shared possession of any socially salient trait. But in Tudor England, where Sumptuary Laws regulated the materials and colors that people from each social stratum could wear, it marked out the group of noblemen who stood at or above the level of a Knight of the Garter. This was an important social marker in those times; and it was a moral marker of sorts too, marking out people believed to be of superior moral fiber. So this group of people would, at that time and in that place, have counted as a “social group” in my sense.

C5.P22

On this understanding of a social group, all of the groups that are marked out by the sorts of traits that our laws commonly treat as prohibited grounds of discrimination

constitute “social groups”—for instance, women, Jews, Haidas, and people with hearing-impairments.¹⁶ But notice both that we need not assume that members of a social group, so defined, identify closely with each other or that their well-being is in some way bound up with their group identity. Nor should we assume that social groups are homogenous, either in the aspirations of their members, or in their needs or abilities. It may be that one sub-group within a particular social group is affected quite differently from another by a given policy. For instance, to return to our gendered dress code example, these codes impose one set of burdens on non-religious women, and an additional set of burdens on those women whose religions require them to dress in ways incompatible with the dress codes. So if we are to understand how such codes subordinate women, we may need to look at a variety of different sub-groups within this broader social group.

C5.P23 We can now go on to consider what it is for a social group, so understood, to be subordinated to others. What does this involve? First, in most situations of social subordination, members of the subordinated social group have less power than members of other groups—not just less political power, but less social power as well, and not just less power in the sense of a diminished capacity to do certain things on their own, but less power in the sense of a diminished capacity to compel others to do what they want them to do. There are, of course, difficult questions here about how we are to conceive of power—whether it is relational or can be conceptualized as a kind of resource that could be

¹⁶ So, of course, do some groups that are not marked out by such traits—for instance, the physically unattractive, and the poor. Whether these traits should be treated as prohibited grounds of discrimination depends, on the view of discrimination that I shall later defend, on whether these groups have been subordinated on the basis of these or correlative traits.

distributed; whether it makes sense to analyze how much power particular individuals have or whether it must be analyzed structurally and systemically. But I do not think that my argument requires me to take a stance on these questions, so I shall leave them open.

C5.P24

Subordinated social groups also generally have less *de facto* authority than others. Having *de facto* authority over others is different from having power over them. In order to get you into the place that I want you to be in, it is enough for me to have the power to move you there: all I need is a large and strong enough army of helpers and a means of confining you. But I can only get you to do what I want of your own volition if I have *de facto* authority over you. So *de facto* authority includes the power to get you, of your own volition, to obey me. It is common within political philosophy to think of *de facto* authority largely in terms of the power to secure others' obedience. But within the context of social subordination, I think it is important for us to think of *de facto* authority as involving a broader set of powers, including the power to be listened to, to be taken seriously when one brings a complaint against another. One fascinating effect of the many recent successful complaints of sexual harassment against prominent film producers such as Harvey Weinstein and prominent actors such as Bill Cosby is that they have made us collectively aware of one kind of authority that female actors, up until now, have lacked. For before these many successful complaints, some actresses did try, unsuccessfully, to bring complaints of sexual harassment. But many were just not believed: as women, they lacked the authority to speak and to be assumed to be telling the truth, and were too often assumed to have been overreacting in an emotional way or misinterpreting the meaning of men's actions. In fact, until recently, female actors were in something uncomfortably analogous to the position of women in those cultures in which the testimony of two to three women is legally required in order to equal the weight of the testimony of one man. Their voices did not carry the same

credibility as a man's voice. So it is important not to have too narrow a conception of what *de facto* authority involves, when we think of the kind of authority that is lacking in cases of subordination. What is lacking is not just the power to get other people to obey you when you issue orders. Before you are even in a position to get other people to obey you, you need to have authority in the sense that other people are ready to listen to you; ready to assume that, absenting evidence to the contrary, you are telling the truth rather than overreacting or misreading events. And that prior authority is the kind of authority that members of subordinated groups quite often lack.

C5.P25

Niko Kolodny has helpfully described a further feature of social subordination using the term “consideration.”¹⁷ In situations of social subordination, Kolodny argues, the group that possesses more power and *de facto* authority may be ascribed certain attributes or personal traits that, within that particular society, attract positive responses of deference and respect. Importantly, these responses are directed not just at these attributes or traits, but at the people who possess them: people with certain features are more likely to be shown greater deference and respect, and their interests are likely to be given greater priority, even in situations where they ought to be weighed equally with those of others. Moreover, the traits themselves are not just regarded as pleasing or as important (as, for instance, athleticism is in some circles, or intellectual acuity in others), but as traits that mark people out as in some sense belonging to a higher or better class of people. So when one shows deference to someone on the basis of such a trait, or excludes another person because she lacks it, one is

¹⁷ See Kolodny, “Rule Over None II,” supra note 16 at 296–7. My analysis of subordination owes much to the basic framework that Kolodny sets up in this article.

contributing to a pattern of responses that mark some people out as higher, or lower, than others.

C5.P26

It seems right, and deeply insightful, that in many cases of subordination, certain traits attract greater deference of just this sort. But I think it's important to add that subordinated groups aren't just perceived to *lack* such traits. Often, the subordinated group is defined in terms of a corresponding trait that comes to be regarded as worthy of *censure*, because it has been identified with patterns of action or dispositions of behavior that are perceived as worthless, or worse, as vices. For instance, Muslims living in the United States at the moment don't just suffer from a lack of deference or consideration, based on perceptions of their religion. Rather, this trait—their religion—is in certain social and political circles regarded as a sign that they are likely either to be terrorists or to be connected with terrorists or, at the very least, to be unpredictable religious extremists. So the trait “being Muslim” functions in certain social circles to mark people out as deserving of condemnation and ostracism. When we think of subordination, then, we should think not just of the absence of consideration toward the disempowered group, but of the use of corresponding traits to condemn, publicly humiliate, or ostracize this group. I shall use the term “censure” to refer to these negative public attitudes.

C5.P27

Kolodny writes as though some of the traits ascribed to certain social groups (he names race and lineage as examples) simply happen to attract greater consideration than the corresponding traits of other groups. So, for instance, being of Caucasian or European descent, or being perceived to be white, attracts greater consideration in our societies than being indigenous. For the purposes of Kolodny's own argument, he does not need to say more than this. But if we are trying to develop a picture of social subordination that helps us understand how discrimination sometimes subordinates, I think it matters very much *how*

certain traits come to attract this greater consideration. For of course, certain races and religions don't just randomly or arbitrarily attract greater consideration while the corresponding traits of others happen to attract censure. Rather, particular traits come to be associated with dispositions to behave in certain ways, with certain talents or lack of talents, and with certain social roles. And it is through this association that the traits come to acquire greater consideration or greater censure. So, for instance, as I suggested above, in certain social and political circles in the United States, the Muslim religion has come to be associated with religious extremism and with a propensity to engage in terrorist activity. These associations of certain traits with particular dispositions, patterns of behavior, and roles are what we commonly call "stereotypes."

C5.P28 Stereotypes, as I understand them here, are generalizations about particular social groups that ascribe most of their members certain desires, dispositions of behavior, or obligations, simply because they possess whatever trait defines that group, as a group: Muslims are thought more likely to be religious extremists, simply by virtue of being Muslim; women are held to be under an obligation to beautify themselves, because that's what women are for.¹⁸ Some of these generalizations may be false; others may be true, and

¹⁸ I have learned much about stereotypes from Rebecca Cook and Simone Cusack's pioneering discussions of stereotypes and stereotyping in *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia, PA: University of Pennsylvania Press, 2010). For my own analysis of the role of stereotypes in cases of discrimination, see <<<REF:BKCH>>> Sophia Moreau, "Equality Rights and Stereotypes," in David Dyzenhaus and Malcolm Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016), pp. 283–304<<<REFC>>>.

may still contribute to subordination. What is important about them, for the purposes of subordination, is that they serve to rationalize the differences in the power and *de facto* authority given to the groups marked out by these traits, and the differences in the consideration and censure they attract. By “rationalize” I do not mean that they actually justify it, but rather that they constitute the kind of proposed justification that is plausible enough that many people in fact accept it. And in some cases, stereotypes seem to work by making us think that there is *no need to justify* certain ways of treating others: they make the connection between a certain trait and a certain social role or a certain kind of treatment seem so obvious that we feel we do not need to justify placing someone with that trait in that social role or giving her that kind of treatment. So, whether by rationalizing certain acts or by apparently obviating the need to justify them in the first place, stereotypes play an important role in the persistence of disparities of consideration and censure, and in the perpetuation of unequal power and *de facto* authority.¹⁹

¹⁹ Must stereotypes be false, to contribute to subordination? I think not. Some of the gender stereotypes that contribute to women’s subordination, for instance, may be statistically true; but they are presented or used as though they are true as a matter of biology, when in fact they reflect the ways in which women in certain communities are socialized and they limit the opportunities open to women and the careers that they are able easily to enter and to conceive of as possible for themselves. Similarly, “statistical discrimination”—that is, differential treatment of different groups that results from using group averages to determine which policies are rational—is often based on statistically sound generalizations. What is problematic in these cases isn’t the truth value of the generalizations. It’s the fact that using the generalizations in these ways perpetuates differences in the power and authority enjoyed by these different groups, results in undue

If we were just to stop here—thinking of subordination in terms of disparities in the power and *de facto* authority held by certain social groups, and in the degree of consideration or censure they attract, based on certain traits—we would omit an important fact about social subordination. Differences in power and *de facto* authority are not only held in place by habits of conscious or explicit consideration or censure or by the stereotypes that support such consideration and censure. Perhaps even more importantly—because more silently, and more insidiously—they are kept in place by apparently neutral policies, practices, and physical structures that privilege the interests of the dominant group, while overlooking those of the subordinate group. Particular such structures have been examined by legal scholars working on indirect discrimination, by feminists such as Rae Langton and Catharine MacKinnon working on pornography, and by critical race theorists and disability theorists trying to expose the ways in which apparently neutral policies and political concepts work to perpetuate the privileged status of certain groups and the disadvantaged status of others.²⁰ But no one has, to my knowledge, developed a general philosophical

deference being given to some and undue censure to others, and renders certain groups invisible in certain contexts.

²⁰ See, for instance, <<<REF:JART>>> Kimberlé Crenshaw, “Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,” *Harvard Law Review* 101(7) (1988), pp. 1331–87 <<<REFC>>>. See also Langton, *Sexual Solipsism*, supra note 16; Catharine MacKinnon, *Only Words*, supra note 16; <<<REF:BK>>> Catharine MacKinnon, *Towards a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1991) <<<REFC>>>; and <<<REF:BKCH>>> Catharine MacKinnon, “Difference and Dominance: On Sex

theory of subordination across these different contexts that gives a place to these structures; and there is, quite strikingly, no general scholarly term for them. I shall call them “structural accommodations.” This term is intended to highlight two important facts about them. First, unlike consideration and censure, they are not attitudes or dispositions of behavior of the discriminator or the public at large: they are real *structures* in our social and physical environment. In some cases, as we shall see, they are literally physical structures. In other cases, they are structures in the sense that they are policies and practices that structure our workplaces, our homes, and our shared social environment. And second, they work by tacitly *accommodating* the needs or interests of one group, and overlooking those of others—with the result that the needs of the dominant group come to seem normal and natural, whereas the different needs of the subordinate group come to seem exceptional and even odd.

C5.P30

Consider first a very literal example of structural accommodation: certain standard features of the buildings in which we live and work. Most houses have a short flight of steps leading up to the front door, and most storefronts facing onto commercial streets standardly have a single step leading up to the door. This easily accommodates those of us arriving on foot, but poses obvious difficulties for people in wheelchairs or for those with certain muscular difficulties. Light switches are standardly placed four feet above the ground, and bathroom mirrors at a similar height—again, perfectly within reach of many adults, but out of reach, and out of sight, for people in wheelchairs. Tobin Siebers, a disability rights theorist, has written quite movingly about the ways in which such structures not only exclude people with certain disabilities from these spaces, but implicitly send a message

Discrimination,” in Ann Cudd and Robin Andreasen (eds.), *Feminist Theory: A Philosophical Anthology* (Oxford: Blackwell, 2005), pp. 392–402<<<REFC>>>].

about the normal human body who is expected to reside there and the normal guest or client who is welcome there.²¹ Our houses and our stores presuppose a certain kind of human body and tacitly invite inside those who share such a body, while not issuing invitations to those who do not share it. This ideal or normal body remains invisible until someone with a non-standard body appears. When that happens, we might add, it can look as though it is the person with the disability who requires some “special” accommodation. But this is only because houses and storefronts have already been built in such a way as to accommodate the needs of the rest of us.

C5.P31 Siebers’ point is not that the construction of houses and stores is an act of deliberate exclusion or deliberate deference to certain body types and censure of others. He recognizes, quite rightly, that houses and storefronts are constructed this way because this answers to the needs of the majority of the adult population. For this reason, I don’t think this particular structural accommodation can be accurately re-described as just another form of “consideration” in Kolodny’s sense. It is not an instance of conscious deference or respect for people without disabilities. It reflects a quite neutral, pragmatic effort to build in a way that is efficient and in demand. But it contributes significantly to the subordination of those with disabilities—by making it physically impossible for them to enter into certain

²¹ <<<REF: BKCH>>> Tobin Siebers, “Disability Studies and the Future of Identity Politics,” in Linda Alcoff, Michael Hames-Garcia, Satya Mohanty, and Paula Moya (eds.), *Identity Politics Reconsidered* (London: Palgrave Macmillan, 2006), pp. 10–30 <<<REFC>>>. See also <<<REF: BK>>> Tobin Siebers, *Disability Theory* (Ann Arbor, MI: University of Michigan Press, 2008) <<<REFC>>>.

buildings, by thereby making it more difficult for them to enter into certain social and commercial relationships, and by making their bodies seem invisible and unnatural.²²

C5.P32

Consider next the example of public washrooms that are segregated by gender, with washrooms for men bearing a large sign on the door that represents a man in trousers, and washrooms for women bearing a large sign on the door that represents a woman in a skirt. We are now aware of the ways in which such signs and practices marginalize transgendered persons and place them at greater risk of being taunted or bullied. But at the time when many such washrooms were built, most of the people commissioning them thought that it was normal and natural to segregate people in this way. This was not intended as an expression of respect or deference for people whose body fits their gender identity, or of censure for

²² One might object here that the exclusion of people with disabilities from traditional buildings is not a true case of *discrimination*, so this is not a helpful example. In American law, the “failure to accommodate” certain disabilities or religions is treated as something distinct from wrongful discrimination—both are prohibited, but there are separate bodies of law that govern them. This distinction between failures to accommodate and wrongful discrimination has, however, been criticized. Legal scholars such as Samuel Bagenstos, Christine Jolls, and Sharon Rabin-Margalioth have argued that the obligations imposed on us by accommodation requirements are no different in kind or degree of onerousness from those imposed on us by anti-discrimination law. See <<<REF:JART>>> Samuel Bagenstos, “Rational Discrimination, Accommodation and the Politics of (Disability) Civil Rights,” *Virginia Law Review* 89 (2003), pp. 825–923 <<<REFC>>>; <<<REF:JART>>> Christine Jolls, “Antidiscrimination and Accommodation,” *Harvard Law Review* 115 (2001), pp. 642–99 <<<REFC>>>; and <<<REF:JART>>> Sharon Rabin-Margalioth, “Anti-discrimination, Accommodation and Universal Mandates—Aren’t They All the Same?,” *Berkeley Journal of Employment and Labor Law* 24 (2003), pp. 111–52 <<<REFC>>>.

those who are not in this position; yet it has had the effect of normalizing the divide, and of rendering invisible those who do not fit on one side of it or the other. This is another example of what I am calling a “structural accommodation”—in this case, a feature of our built environment that accommodates the needs of the majority and constitutes them as normal, while overlooking the needs of a less privileged social group.

C5.P33

I have given two quite literal and physical examples of structural accommodations. But “structural accommodations” in my sense need not actually be physical structures, and they need not function to exclude the subordinated group in quite such a literal way. Think of the many policies in your own academic faculty or department that accommodate the needs of the average male junior faculty member, while posing some obstacles for young female junior faculty members. A tenure clock that runs out four or five years after one’s first appointment is perhaps a good idea for someone whose wife can bear their children; but if you have to bear them yourself, and you have to do so within these particular five years because you are getting older, it is more difficult. In some departments, faculty meetings run from 4–6 p.m., which means that a woman who has children, and who is responsible for picking them up from day-care, has no choice but to exit the meeting early, in full view of her colleagues, who know exactly where she is going and who sometimes view it as a sign that she isn’t able to be fully attentive to her work. When we invite guest speakers to give a talk, we often take them for drinks (if you were Ronald Dworkin, you would take them for raw oysters) and there is usually an expectation that each of us will have a drink or consume a few raw oysters, partly out of collegiality and partly to demonstrate our sophistication. This poses a dilemma for those women who are, or are trying to become, pregnant. They may not want to partake, and may not want to disclose why; yet if they don’t partake and don’t offer some explanation, they appear at best less than collegial, and at worst provincial.

C5.P34

None of these practices is designed to disadvantage women. They do not seem best described as expressions of greater consideration or deference toward men or censure of women. They just happen to accommodate the needs of men who either have no children or have a partner who can bear and take care of them, because this particular social group formed the majority of faculty members at the time that these practices were developed. So they are, in my sense, “structural accommodations”—features of our environment that tacitly accommodate the needs of certain groups, while also normalizing them and rendering the more marginalized group invisible or seemingly exceptional. I should also add that, as the day-care pick-up example shows, the needs that are accommodated do not need to be natural or biological needs: they can be needs that arise because of the social burdens that are placed on one group or another, the way women tend to bear more of the burdens of taking children to and from childcare.

C5.P35

I hope I have given enough examples to explain why, in my view, states of social subordination need to be thought of not just as involving differences in power and *de facto* authority and lesser consideration or censure, but also as involving a variety of structural accommodations that both deny certain opportunities and resources to the subordinated group and serve to render their different needs invisible or abnormal. Because they serve this normalizing function, structural accommodations seem to me to stand in a special, supportive relationship to the other features of subordination. Because they help to constitute the needs of the superior group as normal and natural, they serve indirectly to rationalize the differences in power and *de facto* authority between these groups and those that are subordinate to them, and also indirectly to provide further support for the various expressions of deference and consideration that are given to these groups in other contexts. If, as the gender-segregation and labeling of public toilets implies, it is normal and natural to

be born one gender or the other and to have the gender identity that corresponds to the body you were born with, then those who don't have this are unnatural—and perhaps they don't deserve the kind of consideration given to the rest of us. If it is normal and natural for a smart, high-powered academic to produce a book within their first few years, then it looks as though women who can't manage this aren't capable enough to hold power and don't deserve as much deference.

C5.P36

There is another reason why structural accommodations help to rationalize differences in power, *de facto* authority, and consideration or censure. This is that they, just like the patterns of consideration and censure we examined earlier, are bound up with stereotypes about the subordinated group. One such stereotype is that when a woman has young children, she becomes unable to focus on anything except her children; whereas when a man has young children, he is able properly to compartmentalize them and remain a serious scholar. Because of this stereotype, the structural accommodation of holding meetings from 4–6 p.m. has particularly serious effects on women—because it colors our interpretation of what members of the subordinated group are trying to do, when they try to work around this particular accommodation. When a woman walks out of a departmental meeting at 5:50 p.m., she is not just a scholar leaving the meeting early, as her male colleague might be seen to do. She is much more likely to be seen as a mother abandoning her work for her children; and this in turn is often taken as evidence that she must not really have been fully focused on her work, even during the time when she was at the meeting. So the structural accommodation and the stereotype work together to paint her action in a particular light, to reinforce the stereotype, and to rationalize the differences in power and *de facto* authority that put the subordinated group in this position to begin with.

C5.P37

I have suggested that structural accommodations are bound up with stereotypes, with differences in power and *de facto* authority, and with practices of censoring certain groups, or giving them less consideration, on the basis of certain traits. But it is worth noting that it is quite possible for a structural accommodation to be innocuous, if it is unconnected with these other features of subordination. So there is nothing inherently objectionable in structural accommodations per se. They become implicated in unjust subordination only because, and only to the extent that, they are bound up with stereotypes, differences in power and *de facto* authority, and practices of assigning censure and lesser consideration to certain social groups.

C5.P38

To see this, consider one structural accommodation: the fact that most stores are open during daylight hours and close at night, rather than being open all night and closed during the day. This is convenient for the majority of us, who are awake during the day and who sleep for some part of the night. But it adds hardship to the lives of those employees who work night shifts: if they need to make purchases at stores other than all-night convenience stores, or if they wish to shop together with friends, they have to disrupt their normal sleep time, which is during the day. And this disruption likely affects their bodies more than it would ours, given that their natural sleep rhythms are already disrupted. So the disadvantage they suffer as a result of this policy is more than trivial. It seems also worth noting that this is a group that is already disadvantaged, since night-shift work increases one's risk of suffering from a host of health problems, such as high blood pressure and metabolic syndrome. So we have here a structural accommodation that imposes more than a trivial disadvantage on an already disadvantaged group. Nevertheless, in certain societies, this structural accommodation would not seem problematic. Suppose that the only people who worked night shifts in a particular society were people in relatively prestigious professions:

emergency physicians and nurses at hospitals, lawyers who burned the candle at both ends, judges who were on call all night. The fact that most stores were only open during the day would not then perpetuate practices of censure toward, or lesser deference toward, these night-shift workers; nor would it support stereotypes about them being less able to handle regular work or less well educated, nor would it perpetuate differences in social or political power or *de facto* authority between this group and day workers. In fact, it might even have positive effects on how others viewed the members of this group by adding to the mystique and aura surrounding them: these professionals somehow still manage to get their groceries purchased even though most stores aren't open while they are at work! By contrast, in a society such as our own, in which many night jobs involve menial labor, require little education, and have much less prestige attached to them—jobs such as janitorial work, cleaning, garbage collecting, security enforcing—and tend overwhelmingly to be held by immigrants who are already mistrusted because of their race, the shared practice of opening stores during daylight hours only starts to look more problematic. In order to be implicated in social subordination, then, structural accommodations need to be supported by, and in turn perpetuate, stereotypes, habits of censure and consideration, and differences in power and *de facto* authority between different social groups.

C5.P39

Because structural accommodations, like the differences in power and authority possessed by different social groups, can be innocuous or justified, there is an important difference between these features of subordination and the expressions of consideration or censure mentioned in condition (ii). Consideration and censure involve taking the praise or criticism that is due to a certain *trait* and transferring it to the *person* in a variety of other contexts. So they are always unjustified. Structural accommodations, by contrast, and differences in power and *de facto* authority, and even stereotypes, may sometimes be

innocuous. They become problematic only when they work together to consign certain social groups to a lesser status in society.

C5.P40 Thus far, I have laid out a number of common and morally relevant features of social subordination. I have argued that one social group is unjustly subordinated to another when:

C5.P41 (i) The group has less relative social and political power and less relative *de facto* authority over others, and

C5.P42 (ii) The group has or is ascribed traits that attract less consideration or greater censure than the corresponding traits of the empowered group, and

C5.P43 (iii) These traits are the subject of stereotypes, which help to rationalize the differences in power and *de facto* authority, the habits of consideration and censure, and the structural accommodations, and

C5.P44 (iv) There are structural accommodations in place in society that tacitly accommodate the needs of a dominant group while overlooking the needs of at least some members of the subordinate group; and these accommodations work together with stereotypes to rationalize the differences in power and *de facto* authority, and the differences in consideration or censure.

C5.P45 I offer these four conditions as a set of common and morally salient features of situations involving the subordination of one social group by another, features that, as we will see in [Section 4](#), are relevant in understanding when and why discrimination subordinates. All four conditions will often be satisfied when one social group is subordinated for some substantial period of time. But I do not think we need to suppose that they are individually necessary conditions, nor that they are jointly sufficient conditions. A complete philosophical account of subordination might require additional stipulations. And it

seems quite possible that, at certain early stages in the subordination of a particular social group, some of these conditions could be satisfied but not others, even though over time all four will likely be satisfied.²³ But it does not follow that these features of social subordination are unimportant. They are present in most cases of ongoing subordination. And as I shall go on to argue in [Section 4](#), they give us a good basis for understanding how discrimination can sometimes subordinate particular individuals and groups, and why it is wrongful when it does. They also help us understand the differences between the ways in which direct discrimination subordinates and the ways in which indirect discrimination subordinates.

²³ For instance, it may be that a certain structural accommodation, initially innocuous, comes gradually to support stereotypes about a certain group that rationalize excluding them from certain prestigious professions, and that over time these stereotypes, combined with the persistence of the structural accommodation, lead in turn to expressions of censure of this group. Or it might be the case that expressions of censure, without any accompanying structural accommodations, lead certain groups to become regarded as so inferior that they are effectively invisible in certain social circles or certain areas of life; and that this in turn nurtures stereotypes about them, and leads to structural accommodations that privilege the needs of others and fail to consider the needs and capacities of this group. In both of these examples, although all four conditions do come to be satisfied over time, there is an interim period in which one or two are not satisfied. During some of that time, we might want to say that there was no unjust subordination. But we might well conclude that there was unjust subordination of the group for some of the time, even in the absence of any censure of them, or even in the absence of structural accommodations excluding them.

4. HOW DIRECT AND INDIRECT DISCRIMINATION

C5.S4

SUBORDINATE

C5.P46

Now that we have an account of what social subordination involves, we can go on to consider how direct and indirect discrimination might contribute to such subordination.

C5.P47

Let us look first at direct discrimination. Recall that, according to our earlier definition, a policy directly discriminates against a person, P, if the policy treats P less favorably on the basis of some trait, *t*, than it would treat those who lacked *t*. And recall that policies that directly discriminate either explicitly single out people with a certain trait that is a prohibited ground of discrimination, or single them out on the basis of some trait that is very closely connected to such a trait. In order to see how such policies can subordinate certain social groups, it helps to note an important fact about the prohibited grounds of discrimination. We hold, both as a matter of law and in our own moral thought, that not just any trait can constitute a prohibited ground of discrimination. Rather, those traits that are justifiably treated as prohibited grounds—race, gender, sexual orientation, and religion, for instance—are traits on the basis of which at least one and often quite a number of social groups have been denied equal power and *de facto* authority over others; have been subjected to greater censure or lesser consideration, in the sense that they have been condemned or thought of as less worthy of respect than others; have been stereotyped; and have had their needs overlooked by certain structural accommodations that cater to the needs and circumstances of more powerful social groups. To say this is not to claim that in any particular case of direct discrimination, the use of such a trait or its proxy will necessarily perpetuate all of conditions (i) through (iv). But it is highly likely to perpetuate a number of them, given the past history of these traits and the social uses to which they have been put.

C5.P48

Consider, as an example, the Jim Crow laws briefly mentioned at the start of this chapter, which left blacks in the United States with separate and inferior schools, hospitals, prisons, washrooms, seating areas in public transit, and even water fountains. These laws used the trait “black” in order to accord blacks less power and *de facto* authority, and they used it in such a way as to ascribe to blacks a variety of undesirable traits, because of their alleged blackness—laziness, stupidity, incivility, uncleanliness, and so on. So they helped to perpetuate the disparities of power and *de facto* authority between blacks and whites and the stereotypes that held such disparities in place, and they thereby helped to rationalize the many structural accommodations that privileged the needs of whites over blacks.

C5.P49

Our account of social subordination, then, helps us to understand that policies that are directly discriminatory against groups marked out by a prohibited ground of discrimination can play an important causal role in sustaining the four conditions of unjust subordination.

C5.P50

But there is a second way in which direct discrimination can subordinate. It can also *constitute* an expression of censure, of the kind mentioned in condition (ii), a statement that a particular group is inferior and can justifiably be treated as inferior. During the Jim Crow era, even water fountains were segregated. The signs above white fountains read “Drinking fountain: Whites only.” The sign above fountains for blacks read: “Drinking fountain: Colored.” These signs did not just function to tell people where to drink, nor did the water fountains just provide water. Perhaps more importantly, they marked out “Colored” as the inferior group. They did so partly because the term “only” was attached only to the sign for “Whites,” implying that no one would want to drink from the fountain for “Coloreds” if they were eligible to drink from the “White” fountain. But they also did so through their association with stereotypes such as “Colored people are unclean” and through their

association with the many other separate and inferior public facilities which this group was assigned.

C5.P51

Our account of subordination, then, allows us to conceptualize two rather different ways in which direct discrimination can subordinate a certain social group. It can (a) play an important causal role in sustaining some or all of the four conditions of subordination. But in addition, it can (b) constitute an expression of censure of the subordinated group, or an expression of lack of deference toward them, a way that marks out this group as inferior.

C5.P52

Consider, as another example, the gender-specific dress codes I mentioned earlier, in [Section 1](#). Recall that these codes explicitly prevent women from wearing certain allegedly “male” uniform options, and require them instead to wear tight, body-fitting, and revealing clothing. This perpetuates the stereotype that women are sexual objects without independent agency, and that part of their function, not just as waitresses but as women, is to be beautiful in the eyes of men. It thereby marks women out as inferior. Men, it says, have independent agency and need to dress as such. But women need to dress in such a way as to please men. Unlike the segregated water fountain example, the gendered dress code seems to be less a case of censure and more a case involving lesser consideration. But it is still a case of one social group being branded or stigmatized as inferior to another.

C5.P53

What about cases of indirect discrimination or disparate impact? These are cases in which neither a prohibited ground of discrimination nor its proxy is explicitly used in the policy itself. But the policy has a disproportionately disadvantageous effect on a certain group because they possess a trait that constitutes a prohibited ground of discrimination. Indirect discrimination can seem puzzling, and its moral status unclear, partly because it is less easily interpreted as the kind of expression of censure or denial of equal consideration that is involved in direct discrimination. But my account of subordination has the resources

to explain why indirect discrimination, too, can subordinate people. For my account of subordination focuses not just on the expressions of censure or lesser consideration mentioned in condition (ii), but on the “structural accommodations” in condition (iv) that work tacitly to disadvantage groups marked out by certain traits, and on the stereotypes that rationalize these accommodations and seem to rationalize our not looking for viable alternatives. As I shall now explain, many instances of wrongful indirect discrimination can be seen as structural accommodations—and moreover, as the kind of structural accommodation that is problematically bound up with stereotypes, differences in power and *de facto* authority, and practices of censure and lesser consideration of subordinated groups.

C5.P54 As a first example of wrongful indirect discrimination, consider the cases involving tests for promotion within a certain occupation, such as tests for firefighters or police—tests that do not draw any explicit distinctions along racial lines, but are failed in far greater proportions by blacks and Latinos than by whites.²⁴ In some cases of this type, the differential results are due to prejudicial grading or “buddy systems” and networks of nepotism within the profession that give whites an edge. These cases look rather more like direct discrimination. So let us consider those cases in which only the tests themselves are responsible for the difference: the test questions use situations and analogies and bits of information that, in a particular community, whites are more likely to have encountered already. This is still, I take it, an example of the kind of indirect discrimination or disparate impact that many would find wrongful. My account of subordination allows us to explain why. These tests are an instance of a “structural accommodation” inadvertently given to white employees. They privilege the interests and knowledge of whites over those of blacks,

²⁴ See, for instance, *Ricci v. DeStefano*, 557 U.S. 557 (2009).

and even though they do so completely unintentionally and without malice, they nevertheless serve to perpetuate differences in power and *de facto* authority, and they work together with stereotypes about blacks (they are so lazy that these results must be accurate; they couldn't be competent enough to do well on these tests anyway) to rationalize the persistence of these structural accommodations.

C5.P55

This account of subordination, then, gives us at least one plausible way of understanding how indirect discrimination causally contributes to social subordination. Policies that discriminate indirectly can constitute the kind of structural accommodation that privileges other groups over a given group, reinforces stereotypes about that group, and indirectly rationalizes habits of censure and lesser consideration of them. So indirect discrimination, like direct discrimination, can play an important causal role in sustaining conditions (i) through (iv).

C5.P56

It might seem, however, as though there is no analogue in the case of indirect discrimination to the capacity of direct discrimination to contribute to subordination in a further way, by marking out certain groups as inferior. After all, didn't we see earlier that structural accommodations, unlike expressions of censure and lack of deference, are not inherently problematic? They only become problematic through their association with certain stereotypes, differences in power and *de facto* authority, and practices of ascribing censure and consideration. Perhaps, on this account, all that we can say about indirect discrimination is that it plays some causal role in sustaining subordination—but, unlike direct discrimination, it does not literally mark out certain groups as inferior.

C5.P57

Some scholars might be quite content to claim this. Indeed, many believe that indirect discrimination *is* significantly different from direct discrimination. Indirect discrimination is, on their view, either an injustice of a different and less serious kind, or it is not an injustice at

all, but simply an unfortunate state of affairs for those who are disadvantaged.²⁵ And if you take this view, you might think it is actually quite plausible to suggest that indirect discrimination doesn't, in fact, mark out certain groups as inferior, but only indirectly contributes to states of affairs in which one social group is socially subordinated to another.

C5.P58 But I want to resist this view. I think that indirect discrimination can be just as morally troubling as direct discrimination. And I think that my account of subordination gives us the resources to explain why indirect discrimination, too, does not merely play an indirect causal role in sustaining subordination, but can actually mark out a group as inferior. It is of course true that indirect discrimination does not explicitly *classify* subordinated groups using the traits that are the basis for lesser consideration or censure of them. But I shall try to argue in what follows that the structural accommodations that are at issue in many unjust cases of indirect discrimination serve in an important way to render subordinated groups invisible, and thereby to mark them out as inferior.

C5.P59 To see this, let us turn back to my example of restaurant dress codes and the practices associated with them. One way to understand restaurants' practices of stocking only uniforms for those who are not pregnant and do not have disabilities is as a "structural accommodation." It is not done out of prejudice toward pregnant women or people with

²⁵ See, for instance, Hellman, "Indirect Discrimination and the Duty to Avoid Compounding Injustice," *supra* note 14; Eidelson, *Discrimination and Disrespect*, *supra* note 6, p. 39;

<<<REF:JART>>> John Gardner, "Liberals and Unlawful Discrimination," *Oxford Journal of Legal Studies* 9 (1989), pp. 1–22<<<REFC>>>; and <<<REF:JART>>> John Gardner, "Discrimination as Injustice," *Oxford Journal of Legal Studies* 16(3) (1996), pp. 353–67<<<REFC>>>.

disabilities: rather, such uniforms are not easily and conveniently available, and most people who apply for waitressing jobs are not pregnant or disabled, so it isn't economically efficient for restaurants to keep a stock of such uniforms on hand. But this structural accommodation works together with certain stereotypes about pregnant women and people with disabilities (Pregnant women aren't able to work efficiently or to focus on their work! People with disabilities are not beautiful, so who would enjoy being served by them?) to mark them out as inferior. We can say the same about the training manual that only contains pictures of svelte women wearing particularly feminine uniform options. Both the absence of such uniforms and the absence of pictures of people who look different and who make different choices seem to function to render these groups invisible, and to deny their claim to equal status in no less real and forceful a way than would a sign that read "Pregnant women and people with disabilities: Keep out!" In fact, in an interesting way, the absence of the uniforms and the absence of pictures of these people in the manuals seem to mark them out as inferior even more effectively than a sign would—and even more effectively than the signs on the water fountains do, in my earlier example of direct discrimination. For a sign at least names the subordinated group and so calls attention to their existence. By contrast, the absence of the uniforms, and the absence of pictures of pregnant women or women wearing non-revealing uniforms, quite literally serves to render them invisible as potential candidates for the job of waitress. They simply do not exist in this particular part of our social world—and so neither do their needs.

C5.P60 So indirect discrimination, too, can mark out a social group as inferior. It does so by working together with associated stereotypes and habits of censure or lesser consideration to render a group invisible.

One might at this point object that there is something paradoxical, and therefore problematic, about my claim that indirect discrimination both renders a group invisible and marks them as inferior. How could a policy really do both of these things?²⁶ In order to mark a group out as inferior, doesn't a particular policy have to call attention to them in some way, the way that direct discrimination does? Or, otherwise put, if a structural accommodation really did render a group invisible to us, wouldn't we simply stop seeing them, rather than see them *as inferior*?

But the paradox here is only apparent. In societies ordered by social castes, the lowest caste, such as the Dalit caste in India, is both invisible and inferior. Indeed, the full extent of their inferiority is demonstrated by their invisibility. Although others "see" them in the sense that they see human bodies occupying a certain space, they do not "see" them in the sense of recognizing them as full citizens, capable of participating fully in society and deserving of all of the rights that others are given in that society. Nor do we need examples as extreme as caste systems in order to see that a social group can be at once invisible and marked out as inferior through that very invisibility. There is currently an artistic program supported by the Toronto Transit Commission, which commissions local artists to sketch anonymous people riding local subway trains and buses. Many copies of each sketch are made and put up inside the trains and buses, under the heading "Sketching the Line." Although the majority of people who ride public transportation in Toronto are from visible minorities and many are women, the portraits that have been posted so far consist mostly of white men. There is only one drawing of a woman, and she is obviously Caucasian. When I telephoned the Director of the program to discuss the absence of visible minorities and women in these sketches, he

²⁶ I am grateful to Cheshire Calhoun for this objection.

replied, softly and slowly but with barely controlled exasperation: “Ma’am, the artists are just drawing what they see.” He was right, in a sense; though wrong in his assumption that this exonerated the program. The artists were just drawing what they saw. It may seem incredible that a person could ride a train crowded with women who look Chinese, Haitian, Korean, Anishnawbe, and Pakistani, and yet see only the one white male teenager sitting in the corner. But even though Toronto celebrates its multiculturalism, it is nevertheless true that members of visible minorities, and especially women from visible minorities, are still often not regarded as “normal” or “typical,” even when they outnumber white men in a particular place. So it seems quite likely that the artists just didn’t see them as the normal or representative public transit rider. They were, in this sense, invisible; and the “Sketching the Line” program unfortunately perpetuates their invisibility and thereby marks them out as inferior.

C5.P63

I have now used my account of social subordination to suggest a number of ways in which direct and indirect discrimination can work to subordinate social groups. Direct discrimination can sometimes constitute an expression of censure toward, or lesser consideration for, a subordinated group, as is mentioned in condition (ii). And it can sometimes causally perpetuate the conditions described in (i), (iii), and (iv), sustaining differences in power and authority between the subordinated group and more privileged groups, supporting stereotypes that in turn rationalize inferior treatment of the subordinated group, and keeping in place problematic structural accommodations. Indirect discrimination can sometimes contribute to subordination, similarly, by playing an important causal role in sustaining conditions (i) through (iii). And although it does not normally constitute an expression of censure, it can sometimes serve to render certain social groups invisible in certain contexts, thereby marking them out as inferior.

One might at this point object that talk of “marking out people as inferior” and “rendering people invisible” sounds very much like talk of the expressive meaning of an act or policy. What is it, really, to “mark out as inferior” or to “render invisible” if it is not to send the message that a particular social group is inferior or invisible? So it might seem as though, in spite of my earlier criticisms of the expressivist view, my account has an important expressivist dimension to it, even though it goes beyond this and looks also at a broader range of effects of discriminatory acts. But although part of what it is to “mark out someone as inferior” is to send a message about this person, I do not think that this idea can be entirely parsed in terms of the social message that a policy sends. Rather, marking someone out as inferior or invisible (or both) involves doing things in the world to that person, altering their situation in certain ways, imposing additional costs on certain opportunities, creating certain disincentives that the rest of us do not have to worry about. When all storefronts have a step leading up to them and this renders Jean and his disability invisible, the step doesn’t just send a social message about Jean. It literally prevents him from accessing the store by himself. It reinforces our shared assumption that the normal shopper is someone who is not in a wheelchair. This in turn creates significant incentives for Jean *not* to come forward and ask for the same opportunities as others, for if he were to do so, he would have to present himself as “abnormal.” It seems mistaken to suggest that all of these effects on Jean are simply aspects of the social message that is sent about him.

So my account of subordination differs in several ways from the expressivist account. It looks at a broader range of effects of discriminatory acts when assessing whether they subordinate. It considers subordination to be something that happens to a person as a member of a group, because of a socially salient trait that they share with others. And it takes the social meaning of acts and policies to be but one component of a full analysis of the

ways in which those acts and policies mark out some people as inferior or render them invisible.

C5.P66

My account also enables us to see more clearly the ways in which different sub-groups within a particular social group can be subordinated in relation to each other, and subordinated in different respects and to different extents. On an expressivist account, all acts of discrimination that wrong the members of a particular group wrong them in the same way—by demeaning them as individuals. But my account of social subordination gives us a richer way of describing what is going on, and encourages us to think about the differences between what happens to one sub-group and what happens to another. Think back to my example of the training manual. Because the manual depicts only women with svelte figures wearing conventionally feminine uniform options, it implies that women waitresses are objects of beauty to be enjoyed by men, and so marks out all such women as inferior to men. But, as we saw earlier, it also creates a hierarchy within the class of women, between those who measure up to conventional standards of beauty and those who do not—and it subordinates the latter in a further way. My account of subordination offers us a rich set of concepts with which to analyze this nested form of subordination, and also with which to analyze the ambiguous position of the women who meet these standards and the precariousness of their status relative to the more subordinated women—which does not seem adequately described simply by saying that they are not demeaned relative to these other women but are demeaned relative to men. My account encourages us to explore the particular ways in which directly and indirectly discriminatory policies reinforce different patterns of consideration or censure toward different sub-groups, support different stereotypes about each sub-group, and rationalize differences in power and authority

between these sub-groups as well as between the group as a whole and other, more privileged groups.

C5.P67

In this chapter, I have tried to show that part of the wrongness of discrimination can be traced back to the ways in which certain discriminatory acts and policies subordinate people. This is not, in my view, the only reason why discrimination can be wrong. Discriminatory acts and policies are often challenged as wrongful for other reasons: for instance, because they deny certain people the freedom to shape their lives according to their own values, or because they leave some people without access to the kinds of basic goods and social institutions that one must have access to if one is to be a full and equal member of a certain society. We can accept that discrimination is often wrong because it subordinates some people to others without having to deny that such other facts, too, may play a role in explaining why discrimination is wrong. So the account that I have proposed in this chapter is not offered as a complete account. On the contrary, it is best understood as one part of a more extensive pluralist account of what makes discrimination wrong.^{27,28}

²⁷ My own pluralist account of why discrimination is wrong is laid out in more detail in *The Many Faces of Inequality*, forthcoming from Oxford University Press.

²⁸ Earlier versions of this chapter were presented at the University of Copenhagen; the U.C.L.A. Legal Theory Workshop; the “Workshop on Political Equality” at N.Y.U. in 2017; the 5th Annual Workshop for Oxford Studies in Political Philosophy; the Gould School of Law’s “Law and Philosophy Workshop”; and the Faculty of Laws, University College London. I am especially grateful to Cheshire Calhoun, Kasper Lippert-Rasmussen, and Samuel Scheffler for extensive comments on the chapter, and to Colm O’Cinneide, Barbara Herman, Greg Keating, Niko Kolodny, Jonathan Quong, Daniel Viehoff, and Gary Watson for helpful suggestions.